

al

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

JOSEPH BREITFELDER

Plaintiff

vs.

HAMILTON COUNTY SHERIFF  
SIMON LEIS, et al.

Defendants

Case No. C-1-01-617

JUDGE BECKWITH

MAGISTRATE HOGAN

**SECOND AFFIDAVIT OF STEPHEN  
K. SHAW IN OPPOSITION TO  
MOTION FOR RECONSIDERATION**

STATE OF OHIO :  
 :ss  
COUNTY OF HAMILTON :

Now comes Stephen K. Shaw, who after being duly sworn, subscribed his name to the following statements:

1. I am Trial Counsel for the Hamilton County defendants in this action. I am an Assistant Hamilton County Prosecuting Attorney.
2. On March 7, 2003, I sent, via facsimile, the note attached hereto as Exhibit 4, which reflected Mr. Bernard's statement to me that Mr. Breitfelder might not agree to undergo an independent medical examination by Dr. Manges.
3. Attached hereto as Exhibit 5 is the Second Notice of Independent Medical Examination that was filed with the Court and served via U.S. Mail on March 13, 2003. Although I do not have documentation of the conversation, I believe that Mr. Bernard indicated that his client had agreed to undergo the Independent Medical Examination as of that date.
4. Attached hereto as Exhibit 6 is a letter sent April 1, 2003 via ordinary mail to Lucian

Bernard, confirming and reminding him of the Independent Medical Examination that was scheduled for April 9, 2003 at 9:00 AM.

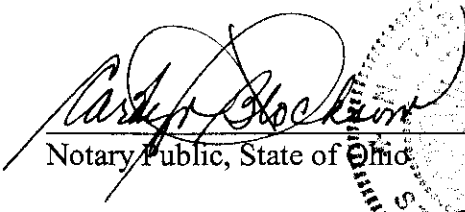
5. On April 3 a letter, signed by Susan Gertz was faxed to Mr. Bernard at 12:07 PM. This letter contained the reference to the IME on April 8, instead of April 9. Attached hereto as Exhibit 7 is the April 4, 2003 letter that was faxed to Mr. Bernard at 12:03 PM on April 4 to correct the mistaken letter sent in the afternoon of April 3. Prior to this letter, a telephone call was made by our office to Mr. Bernard's office in the early morning of April 4 to point out the typographical error in the April 3 letter and to correct the date of the appointment.
6. Hamilton County has paid both cancellation fees incurred as the result of Mr. Breitfelder's failure to appear at the scheduled time of his appointments, incurring a total cost of \$500.00, plus significant attorney and paralegal time to coordinate changes of dates and times and to obtain payment of these fees. Hamilton County agreed to forego collection of the first cancellation fee in exchange for Mr. Breitfelder's agreement to voluntarily appear for the IME, even though Hamilton County determined that the failure to appear was not the fault of Hamilton County.

FURTHER AFFIANT SAYETH NAUGHT.

  
\_\_\_\_\_  
Stephen K. Shaw

Sworn to and subscribed in my presence on this 20<sup>th</sup> day of January by Stephen K.

Shaw, who is personally known to me.

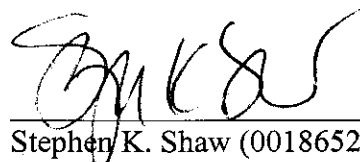
  
\_\_\_\_\_  
Notary Public, State of Ohio

CAROLYN D. BLACKSOM  
NOTARY PUBLIC, STATE OF OHIO  
MY COMMISSION EXPIRES 05-18-05

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Affidavit has been manually filed with the Court and has been served upon the following counsel of record on this 20<sup>th</sup> day of January 2004 via U.S. Mail.

Lucian Bernard, Esq.  
Attorney at Law  
1224 Highway Avenue  
Covington, Kentucky 41012

A handwritten signature in black ink, appearing to read "SKS", is written over a horizontal line.

Stephen K. Shaw (0018652)  
Assistant Prosecuting Attorneys

MICHAEL K. ALLEN  
Hamilton County Prosecutor  
Civil Division

230 E. Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
Writer's Phone: 946-3071  
Fax: (513) 946-3018

## FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: 859-655-3703

**To: Lucian J. Bernard**  
**From: Stephen K. Shaw**  
**Date: March 7, 2003**  
**RE: Breitfelder v. Hamilton County**

**COMMENTS:**

Dear Mr. Bernard:

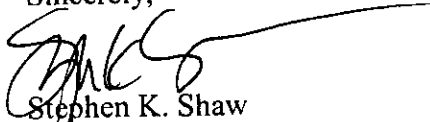
I understand from your telephone call that you anticipate that we can reach agreement on Mr. Breitfelder undergoing an examination if our office will waive the cancellation fees. Please let me know, as soon as possible if Mr. Breitfelder intends to appear for an examination.

We need to schedule depositions of fact witnesses and expert witnesses. I would suggest that we schedule a conference with Magistrate Judge Hogan and present an Agreed Entry modifying our expert report date, the discovery cutoff date and any other dates that we agree to modify. Certainly, we have time to work with in light of the trial date.

Please let me know a few dates and times when you would be available to meet with Judge Hogan. As soon as we know about the examination, we can schedule that and then establish appropriate cutoff dates to complete our preparation for trial or for dispositive motions.

Thank you for your attention to these issues.

Sincerely,

  
Stephen K. Shaw  
Assistant Prosecuting Attorney

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FILED

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

MAR 13 2003

KENNETH J. MURPHY, Clerk  
CINCINNATI, OHIO

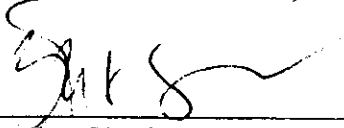
JOSEPH BREITFELDER	:	CASE NO. C-1-02 617
Plaintiff	:	Judge Beckwith
vs.	:	<u>SECOND NOTICE OF</u>
	:	<u>INDEPENDENT MEDICAL</u>
SIMON L. LEIS, JR., et al.	:	<u>EXAMINATION OF JOSEPH</u>
Defendants	:	<u>BREITFELDER</u>

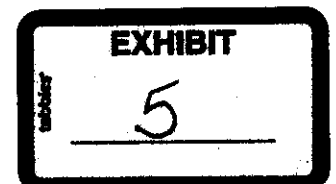
Please take Notice that Defendants, by and through agreement of counsel, have rescheduled the Independent Medical Examination of the Plaintiff, Joseph Breitfelder for Wednesday April 9, 2003 beginning at 9:00 a.m. The Independent Medical Examination will be conducted by Kenneth J. Manges, M.D. at his office, which is located at The Kroger Building, Suite 1825, 1014 Vine Street, Cincinnati, Ohio 45202, telephone number (513) 784-1333.

The Independent Medical Examination will be conducted pursuant to the Federal Rules of Civil Procedure for all uses and purposes authorized thereby.

Respectfully submitted,

MICHAEL K. ALLEN  
PROSECUTING ATTORNEY  
HAMILTON COUNTY, OHIO

  
\_\_\_\_\_  
Stephen K. Shaw, 0018652  
Susan M. Gertz, 0065319  
Assistant Prosecuting Attorneys  
Hamilton County, Ohio



230 E. Ninth Street, Suite 4000  
Cincinnati, Ohio 45202-2151  
513/946-3071 (Shaw)  
513/946-3027 (Gertz)  
FAX 513/946-3018

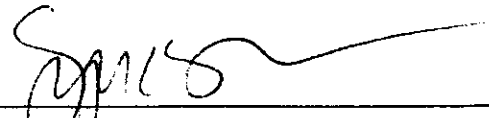
TRIAL ATTORNEY FOR DEFENDANTS LEIS,  
PORTUNE, NEYER, AND DOWLIN

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served this 13<sup>th</sup> day of March, 2003, by regular U.S. Mail to the following:

Lucian Bernard  
Attorney at Law  
1224 Highway Avenue  
Covington, Kentucky 41012

Robert J. Gehring  
Attorney at Law  
30 Garfield Place, Suite 940  
Cincinnati, Ohio 45202

  
\_\_\_\_\_  
Stephen K. Shaw, 0018652  
Assistant Prosecuting Attorney

**MICHAEL K. ALLEN**  
HAMILTON COUNTY PROSECUTING ATTORNEY

CIVIL DIVISION  
230 EAST NINTH STREET, SUITE 4000  
CINCINNATI, OH 45202-2151  
PHONE: 513 946-3040  
FAX: 513 946-3018  
WWW.HCPROS.ORG  
WRITER'S DIRECT DIAL NUMBER  
946-3071

April 1, 2003

Lucian J. Bernard, Esq.  
Pearson & Bernard, PSC  
1224 Highway Avenue  
Covington, Kentucky 41011-1073

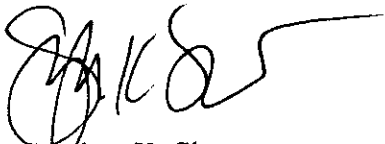
Re: Breitfelder v. Leis, et al.  
Case No C-1-01-617

Dear Counsel:

This is a friendly reminder regarding the Independent Medical Examination, scheduled on Wednesday April 9, 2003 beginning at 9:00 a.m. The examination will take place at the office of Kenneth J. Manges, M.D., 1014 Vine Street, Suite 1825, Cincinnati, Ohio 45202. If Mr. Breitfelder wears glasses or contacts, he will need to have them with him. He will undergo psychological testing and vocational assessment.

Thank you for your cooperation in this matter.

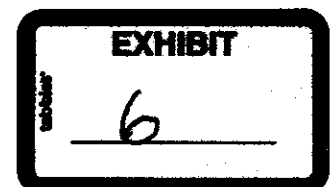
Very truly yours,



Stephen K. Shaw  
Assistant Prosecuting Attorney

SKS/cdb

cc: Robert J. Gehring, Esq.



**MICHAEL K. ALLEN**

HAMILTON COUNTY PROSECUTING ATTORNEY

CIVIL DIVISION  
230 EAST NINTH STREET, SUITE 4000  
CINCINNATI, OH 45202-2151  
PHONE: 513 946-3040  
FAX: 513 946-3018  
WWW.HCPROS.ORG  
WRITER'S DIRECT DIAL NUMBER  
946-3027

April 4, 2003

Via Ordinary Mail and Facsimile

Lucian J. Bernard, Esq.  
Pearson & Bernard, PSC  
1224 Highway Avenue  
Covington, KY. 41011-1073

Re: Breitfelder v. Leis, et al.

Dear Mr. Bernard:

I write, once again, to confirm various details of our telephone discussion of this morning. You confirm that Mr. Breitfelder will appear for purposes of an independent medical examination by Dr. Kenneth Manges, 1014 Vine Street, Ste. 1825, Cincinnati, Ohio 45202, (513) 784-1333 on **Wednesday, April 9, 2003 at 9:00 a.m.** I was mistaken in my letter of April 3 that the examination was scheduled for Tuesday, April 8. Please accept my apology for any confusion that I may have caused. As we discussed, Mr. Breitfelder may have to present to Dr. Manges a second time, after the April 9 session, to complete the examination, in the event that Dr. Manges' schedule does not allow for the exam to be completed on that day.

Also, you confirmed that you are still holding the dates of **April 28** and **May 5** for the depositions of lay witnesses Guy Kaufman, Helen Breitfelder, William Breitfelder and experts Dr. Jobalia and Dr. Shapiro. You indicated that you prefer that I notice Mr. Kaufman, directly, by subpoena, in order to schedule his deposition. You also indicated that you will notify me shortly as to the availability of your experts, Drs. Jobalia and Shapiro. If you have any questions, please do not hesitate to contact either Steve Shaw or myself. Thank you.

Sincerely,

Susan Marie Gertz  
Assistant Prosecuting Attorney





Lucian J. Bernard, Esq.  
Pearson & Bernard, PSC  
April 4, 2003

**Page 2**

SMG/

cc: Robert Gehring, Esq.  
File

MICHAEL K. ALLEN  
Hamilton County Prosecutor  
Civil Division  
230 E. Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
Phone: 946-3027  
Fax: (513) 946-3018

## FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: 859-655-3703

To: Lucian Bernard, Esq.  
From: Susan M. Gertz  
Date: April 4, 2003

DOCUMENTS	NUMBER OF PAGES*
Letter 04/04/03	1

COMMENTS:

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4 Apr '03 12:04PM Page 1

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